

STATE ACTION AND GENDER (IN)EQUALITY: THE UNTAPPED POWER OF WASHINGTON'S EQUAL RIGHTS AMENDMENT

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Abstract: Washington's Equal Rights Amendment (ERA) is a powerful legal tool. Its sweeping, protective language triggers the application of an *absolute* standard of review—a level of review even higher than strict scrutiny. Yet the ERA is underutilized by litigants seeking protection against gender-based discrimination. This may be due to the inconsistencies in the Washington State Supreme Court's state action jurisprudence. Though the ERA includes the phrasing “under the law,” its plain language does not necessarily support a finding of a state action requirement.

The state action doctrine is grounded in federalism and separation of power concerns that are not present at the state level. Therefore, the Washington State Supreme Court is free to construe the amendment as lacking a state action requirement. Despite the ambiguity of the amendment's text, and the absence of federalism concerns at the state level, the Washington State Supreme Court has interpreted a state action requirement to be implicit within the ERA. The Court's state action jurisprudence with respect to other constitutional provisions—Washington's Privacy, Due Process, and Free Speech provisions—is similarly inconsistent and overly reliant on analogous provisions in the U.S. Constitution. These inconsistencies in the state action doctrine restrict the efficacy of provisions such as the ERA. The Washington State Supreme Court must adjust its understanding of the state action requirement, thus enabling the ERA to fill in statutory gaps in protection against sex-based discrimination and become a stronger guardian of gender equality.

INTRODUCTION

Washington's Equal Rights Amendment (ERA) reads “[e]quality of rights and responsibility under the law shall not be denied or abridged on account of sex.”¹ Washington courts have interpreted its protective language to trigger an *absolute* bar on discrimination—a standard of review even higher than the highest federal standard.² This absolute prohibition on gender-based classifications makes the ERA a powerful tool. However, despite the ERA's strong language, it is underutilized by litigants seeking protection against gender-based discrimination. This

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1. WASH. CONST. art. XXXI, § 1.

2. *Darrin v. Gould*, 85 Wash. 2d 859, 870–71 540 P.2d 882, 889 (1975).

may be due to the Washington State Supreme Court's inconsistent state action jurisprudence. The court has interpreted the ERA to have a state action requirement, although its text is ambiguous.³ The state action doctrine is founded on concerns of federalism and separation of powers that are present at the federal level, but which are absent at the state level.⁴ Thus, the Washington State Supreme Court is free to interpret the ERA as lacking a state action requirement.

In Part I, this Comment examines the history of Washington's ERA—which traces its origins to the failed federal amendment—and finds that the language of Washington's ERA intentionally differs from the failed federal provision. This Comment proceeds by arguing in Part II that the standard of review applied by Washington courts is a point of strength, while its state action requirement is a point of weakness. In Part III, this Comment focuses on the inconsistencies in Washington's state constitutional rights jurisprudence with respect to the state action requirement. This Comment determines in Part IV that, absent a state action requirement, the ERA would be a more useful tool, able to fill the statutory gaps in protection against gender-based discrimination. This Comment ultimately argues that the Washington State Supreme Court should interpret the ERA to lack a state action requirement: an interpretation which would ultimately be beneficial to litigants.

I. THE HISTORY OF THE VARIOUS EQUAL RIGHTS AMENDMENTS

A. *The History (and Failure) of the Federal Equal Rights Amendment*

Washington's ERA, Article XXXI of the Washington Constitution, has roots in the failed passage of the federal Equal Rights Amendment.⁵ On July 9, 1978, women's rights advocates marched onto the national mall, demanding the ratification of the federal amendment by the states.⁶

3. See, e.g., *Darrin v. Gould*, 85 Wash. 2d 859, 862, 540 P.2d 882, 884 (1975) (asking whether denying girls permission to play on a high school football team constituted "a discrimination by state action"). The court did not analyze whether Washington's ERA actually contained a state action requirement. *Id.* In *MacLean v. First Northwest Indus. of Am., Inc.*, 96 Wash. 2d 338, 347, 635 P.2d 683, 688 (1981), the Court stated that the parties had agreed that it is necessary to show that state action was involved in order to maintain an action under Washington's ERA. The Court did not focus on the existence of a state action requirement within Washington's ERA. *Id.*

4. See *infra* section II.B.2.

5. See Mary Patrice McCausland, *Washington's Equal Rights Amendment and Law Against Discrimination—the Approval of the Seattle Sonics' "Ladies' Night"*—*MacLean v. First Northwest Industries, Inc.*, 96 Wn. 2d 338, 635 P.2d 683 (1981), 58 WASH. L. REV. 465, 466 (1983).

6. See Tracey Jean Boisseau & Tracy A. Thomas, *After Suffrage Comes Equal Rights? ERA as the*

However, by the time this women's march on Washington took place, the fight over the ERA had been going on for over half a century.⁷ The first federal Equal Rights Amendment was proposed formally by Alice Paul, the American suffragist and women's rights activist, in 1923.⁸ At the seventy-fifth anniversary of the 1848 Women's Rights Convention in Seneca Falls, New York, Paul declared the absolute need for such an amendment.⁹ Paul's amendment was introduced in 1923 to Congress by both a representative¹⁰ and a senator of Kansas.¹¹ The amendment was introduced unsuccessfully to every Congress thereafter without actually being debated until 1972.¹² Despite these repeated introductions to Congress, the amendment effectively languished for decades until the civil rights movement of the 1960's renewed interest.¹³

Women's rights activists, troubled by their lack of victories in litigation, turned once more to the passage of the federal Equal Rights Amendment.¹⁴ By 1972, both the House and the Senate had overwhelmingly passed the federal Equal Rights Amendment, with the House voting in favor of the amendment 354–23 and the Senate voting in favor 84–8.¹⁵ The Senate then provided “a seven-year timeline for the required three-fourths of the states to ratify the amendment.”¹⁶ The text of the federal amendment read: “Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.”¹⁷

Meanwhile, gender equality advocates continued to fight this battle through litigation.¹⁸ In 1971, the Supreme Court decided *Reed v. Reed*,¹⁹

Next Logical Step, in 100 YEARS OF THE NINETEENTH AMENDMENT: AN APPRAISAL OF WOMEN'S POLITICAL ACTIVISM 227, 227 (Holly J. McCammon & Lee Ann Banaszak eds., Oxford Univ. Press 2018).

7. *Id.*

8. *Id.* at 230.

9. *Id.*

10. The representative, Daniel Read Anthony, was the nephew of the celebrated suffragist Susan B. Anthony. *See id.*

11. *Id.*

12. *See* Sarah A. Soule & Brayden G. King, *The Stages of the Policy Process and the Equal Rights Amendment, 1972–1982*, 111 AM. J. OF SOC. 1871, 1871–72 (2006).

13. *See* Boisseau & Thomas, *supra* note 6, at 241.

14. *Id.* at 242.

15. *Id.* at 243.

16. *Id.*

17. H.R.J. Res. 208, 92d Cong., 86 Stat. 1523 (1972).

18. *See* Boisseau & Thomas, *supra* note 6, at 246.

19. 404 U.S. 71 (1971).

a landmark victory for women's rights activists.²⁰ This was the first time the Court held that a law discriminating on the basis of sex violated the Equal Protection Clause of the Fourteenth Amendment.²¹ Then, in 1973, the Supreme Court decided *Frontiero v. Richardson*,²² a landmark case for gender equality. But the victory for gender equality advocates in *Frontiero* was bittersweet.²³ Although the plurality in *Frontiero* argued for the application of strict scrutiny to sex-based classifications,²⁴ the concurrence argued that the Court should wait for the seemingly imminent passage of the federal Equal Rights Amendment, which would settle the tier of scrutiny question.²⁵ The concurrence noted, "[t]he Equal Rights Amendment . . . if adopted will resolve the substance of this precise question." Furthermore, the concurrence argued, "democratic institutions are weakened, and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional processes."²⁶ Thus, the Court waited for the outcome of the ratification process and failed to settle the question of the standard of review.²⁷

The Supreme Court's 1976 decision in *Craig v. Boren*²⁸ underscored "the Court's ambivalence about both the procedural and substantive aspects of a revolution in gender roles."²⁹ As the federal Equal Rights Amendment had not yet been adopted, the Court in *Craig* applied intermediate scrutiny to sex-based classifications, rather than the strict scrutiny standard supported by both the majority in *Reed* and the plurality in *Frontiero*.³⁰ This was a "Goldilocks solution"—merely a partial victory for gender equality advocates.³¹

By 1973, twenty-four states had ratified the federal Equal Rights Amendment and it appeared that others would follow this "trajectory"

20. See Boisseau & Thomas, *supra* note 6, at 245.

21. *Reed*, 404 U.S. at 76 (1971).

22. 411 U.S. 677 (1973).

23. See Boisseau & Thomas, *supra* note 6, at 245.

24. *Frontiero*, 411 U.S. at 688.

25. *Frontiero*, 411 U.S. at 692 (Powell, J., concurring).

26. *Id.*

27. *Frontiero*, 411 U.S. 677.

28. 429 U.S. 190 (1976).

29. See Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CALIF. L. REV. 755, 826 (2004).

30. *Craig*, 429 U.S. at 217–19 (Rehnquist, J., dissenting).

31. See Mayeri, *supra* note 29, at 826.

toward ratification.³² However, the Supreme Court's 1973 decision in *Roe v. Wade*³³ resulted in a shift in the debate, ultimately slowing the states' ratification of the amendment.³⁴ Some members of the anti-abortion movement worried that the federal Equal Rights Amendment would expand abortion rights,³⁵ while others insisted that the amendment would actually increase protections for both women and their unborn children.³⁶ This disagreement within the pro-life movement was a precipitating factor that led to a shift in the national consensus on the federal Equal Rights Amendment.³⁷ This was partly due to a shift from the public's concern with "abstract principles of equality"³⁸ to more concrete concerns over women being required to register for the draft.³⁹

Although by 1977 thirty-five states had ratified the amendment, five states had rescinded their previous ratifications.⁴⁰ The effect was disastrous for supporters of the amendment.⁴¹ Despite an extension of the seven-year deadline issued by Congress, in 1982 the amendment was still "three states short of the required 38 states."⁴² The federal Equal Rights Amendment was not quite dead—as evidenced by repeated attempts to revive it over the following decades—but "it was at least comatose."⁴³

Today, the fight over the federal amendment endures as gender equality advocates continue to champion it.⁴⁴ Hollywood celebrities, members of Congress, and feminist organizations have joined together to promote the addition of a constitutional guarantee of gender equality.⁴⁵ This movement is focused on the problems that women still face in the United States, such as "pay inequity, violence against women, employers' failures to accommodate pregnancy, and the general lack of public support for child-

32. See Boisseau & Thomas, *supra* note 6, at 243.

33. 410 U.S. 113 (1973).

34. See Boisseau & Thomas, *supra* note 6, at 244.

35. See MARY ZIEGLER, *AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE* 37 (2015).

36. *Id.*

37. *Id.*

38. See Boisseau & Thomas, *supra* note 6, at 243.

39. *Id.* at 244.

40. *Id.* It is still unclear whether states' rescissions of their ratification votes were legal. See *id.* at 245.

41. *Id.* at 245.

42. Soule & King, *supra* note 12, at 1872.

43. See Boisseau & Thomas, *supra* note 6, at 245.

44. *Id.* at 248.

45. See Julie C. Suk, *An Equal Rights Amendment for the Twenty-First Century: Bringing Global Constitutionalism Home*, 28 YALE J.L. & FEMINISM 381, 383 (2017).

rearing.”⁴⁶ The ongoing battle over the federal Equal Rights Amendment highlights the systemic injustices and discrimination still faced by women, and the limitations of the laws that currently exist to address these concerns.⁴⁷ “If I could choose an amendment to add to the Constitution, it would be the Equal Rights Amendment,” stated Justice Ginsburg to the National Press Club in 2014.⁴⁸ She continued, “[L]egislation can be repealed, it can be altered . . . [s]o I would like my granddaughters, when they pick up the Constitution, to see that notion—that women and men are persons of equal stature.”⁴⁹

B. The History (and Moderate Success) of State’s Equal Rights Amendments

Despite the failed passage of the federal Equal Rights Amendment, many individual states have adopted some variation of the amendment into their own constitutions.⁵⁰ Most of these states adopted their versions of the Equal Rights Amendment between 1971 and 1978, the time period in which the federal amendment was in the process of ratification by the states.⁵¹ The language of these state provisions parallel the text of the proposed federal amendment in only some instances.⁵² While many state amendments closely track the language of the failed federal amendment,⁵³ others use language more similar to that of the Equal Protection Clause of the Fourteenth Amendment.⁵⁴ Currently, almost half of the states have adopted their own Equal Rights Amendments.⁵⁵ The earliest state amendment was adopted in 1879 by California.⁵⁶ In January 2019, Delaware became the most recent state to adopt such an amendment.⁵⁷

46. *Id.* at 388.

47. *Id.*

48. Nikki Schwab, *Ginsburg: Make ERA Part of the Constitution*, U.S. NEWS & WORLD REP. (Apr. 18, 2014), <https://www.usnews.com/news/blogs/washington-whispers/2014/04/18/justice-ginsburg-make-equal-rights-amendment-part-of-the-constitution> [<https://perma.cc/AB4M-F7L6>].

49. *Id.*

50. See Suk, *supra* note 45, at 383.

51. See LESLIE W. GLADSTONE, CONG. RESEARCH SERV., RS20217, EQUAL RIGHTS AMENDMENTS: STATE PROVISIONS 1–2 (2004).

52. See Judith Avner, *Some Observations on State Equal Rights Amendments*, 3 YALE L. & POL’Y REV. 144, 146 (1984).

53. *Id.* at 146.

54. See GLADSTONE, *supra* note 51, at 1.

55. See Suk, *supra* note 45, at 383.

56. See GLADSTONE, *supra* note 51, at 1.

57. Randall Chase, *Delaware Equal Rights Amendment Gets Final Approval*, DEL. ONLINE (Jan. 16, 2019), <https://www.delawareonline.com/story/news/2019/01/16/delaware-equal-rights->

Despite the existence of these state amendments, they are not widely litigated.⁵⁸ Courts tend to avoid reaching decisions based on state Equal Rights Amendments.⁵⁹ Rather, state judges generally base their decisions on other grounds, either statutory or constitutional,⁶⁰ and litigants more commonly rely on state antidiscrimination statutes.⁶¹ This is perhaps “attributable to the innate conservatism and hesitancy of the bar and bench,” the untried nature of these amendments, the variation in the standard of review applied by different states, or the similarly inconsistent state action requirement.⁶²

C. *The History of Washington’s Equal Rights Amendment*

Washington added its own version of the federal Equal Rights Amendment, Article XXXI of the Washington Constitution, in 1972.⁶³ Representative Lois North, the primary sponsor of the amendment, introduced House Joint Resolution No. 61, “Providing for equality of rights regardless of sex.”⁶⁴ The Washington state senators debated possible exceptions to the amendment.⁶⁵ Senator Perry Woodall asked whether, under this new amendment, it would be prohibited to hire only individuals of a specific gender to be restroom attendants.⁶⁶ Senator Francis replied, “if there is a valid reason for a distinction . . . if it involves an invasion of privacy or some other function . . . there will still be some sexual distinction that will be valid and will not be arbitrary.”⁶⁷ Senator Francis continued, “it says equality of rights and responsibilities and maybe that needs to be delineated on a case by case basis. But what we are saying is that sexes are equal.”⁶⁸

The 1972 House and Senate Journals provide no explanation for the amendment’s lack of an unambiguous, explicit state action requirement,⁶⁹

amendment-gets-final-approval/2597949002/ [https://perma.cc/S3VW-ZJ29].

58. See Avner, *supra* note 52, at 146.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 146–47.

63. WASH. CONST. art. XXXI, § 1.

64. H.J., 42d Leg., 2d Ex. Sess. 50 (Wash. 1972).

65. See S.J., 42d Leg., 2d Ex. Sess. 345–47 (Wash. 1972).

66. *Id.* at 346.

67. *Id.*

68. *Id.*

69. See H.J., 42d Leg., 2d Ex. Sess. 274 (Wash. 1972); S.J., 42d Leg., 2d Ex. Sess. 345–47 (Wash. 1972).

and relevant articles in *The Seattle Times* are similarly unhelpful.⁷⁰ A single 1972 article told readers that passage of the state ERA would mean that “[s]uch matters as opening doors for women, caring for children and supporting a family would remain a matter of individual choice. The amendment applies only to things ‘that come under the law.’”⁷¹ One useful, historical source is the 1972 Washington Voters’ Pamphlet, written by the Washington Attorney General, which makes direct reference to a possible state action requirement within the ERA:

This proposed amendment . . . would apply to acts done under authority of law, but not to the private conduct of persons. Thus, state and local government could not treat persons differently because they are of one sex or the other. Individual persons acting in their private capacities would, however, not be prohibited by the amendment from making distinctions and expressing preferences between other persons because of their sex.⁷²

The pamphlet’s statement in support of the proposed amendment also wrote that its passage would “have no effect on private life. The amendment is only concerned with what happens ‘under the law.’”⁷³ Despite the wording of the voters’ pamphlet, which implies a state action requirement, the statements for or against in a pamphlet are not binding on Washington courts.⁷⁴ The voters’ pamphlet may be somewhat persuasive when courts want it to be.⁷⁵

Washington courts “have previously considered statements in favor of ballot measures in determining the effect of the measure and have specifically done so with regard to the ERA.”⁷⁶ In ascertaining the meaning of a law, “[m]aterial in the official voters’ pamphlet may be considered by the court in determining the purpose and intent of [the

70. The newspaper now known as *The Seattle Times* was then named *The Seattle Daily Times*.

71. Byron Johnsrud, “Rights Amendment Gets Male Support,” SEATTLE DAILY TIMES, Aug. 18, 1972, at D1.

72. LUDLOW KRAMER, OFFICE OF THE SECRETARY OF STATE OF WASHINGTON, OFFICIAL VOTERS’ PAMPHLET 53 (1972) [hereinafter VOTERS’ PAMPHLET].

73. *Id.* at 52.

74. See *Andersen v. King County*, 158 Wash. 2d 1, 49 n. 19, 138 P.3d 963 (2006).

75. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1*, 149 Wash. 2d 660, 687, 72 P.3d 151 (2003) (finding that “where the court finds that a law is susceptible to multiple interpretations, the standard tools of statutory construction apply to determine the voter’s intent, including resorting to extrinsic sources,” and that voters’ pamphlets may be used by the court).

76. The Washington State Supreme Court considered the statements in the voters’ pamphlet on same-sex marriage and found that the pamphlet indicated that the ERA was not intended to grant same-sex couples the right to marry. See *Andersen*, 158 Wash. 2d at 49, 138 P.3d at 989 (citing *Marchioro v. Chaney*, 90 Wash. 2d 298, 305, 582 P.2d 487, 491 (1978)).

provision].”⁷⁷ Where a law is ambiguous, intent becomes a relevant factor.⁷⁸ Although courts should focus on the collective intent of the voters, “[w]here possible, the intent of the electorate is to be derived initially from the language of the statute itself.”⁷⁹ An analysis of the plain language of Washington’s ERA indicates that its text lacks an explicit, unambiguous state action requirement. Thus, Washington courts need not look farther than the language of the provision itself in search of legislative intent; interpreting a statute using this “plain meaning approach” is “more likely to carry out legislative intent.”⁸⁰

Washington’s proposed ERA went on the ballot in 1972.⁸¹ The pamphlet mailed to Washington voters read, “It is presently permissible . . . in some instances, to base legal classifications of persons solely upon sex.”⁸² The pamphlet’s statement in support of the amendment assured voters that its adoption would not “Mean an End to All Sexually Segregated Facilities,” such as “restrooms, hospital wards and lingerie departments.”⁸³ The voters’ pamphlet also stated that it was not an amendment for women’s rights, and that it did not “protect just a minority. It protects the rights of all persons not to have the law discriminate against them solely on the basis of sex.”⁸⁴

The pamphlet’s statement against the adoption of the amendment, in contrast, argued, “it is absolutely ridiculous to have girls compete with boys on the high school wrestling team.”⁸⁵ The statement against the amendment also told voters that its adoption would mean that “[h]omosexual and lesbian marriage would be legalized . . . the beauty and sanctity of marriage must be preserved from such needless desecration.”⁸⁶

The Washington State Women’s Council met in November of 1972 to discuss the state ERA’s official statements in the Voters’ Pamphlet, and a number of the amendment’s supporters felt “that statements made by opponents of the measure were not accurate.”⁸⁷ As Washington voters’

77. Wash. State Dep’t of Revenue v. Hoppe, 82 Wash. 2d 549, 552, 512 P.2d 1094, 1096 (1973).

78. See State v. Thorne, 129 Wash. 2d 736, 763, 921 P.2d 514, 526–27 (1996).

79. See, e.g., *id.* (holding that in searching for legislative intent, courts should look first to the plain language of the statute).

80. Dep’t of Ecology v. Campbell & Gwinn, LLC, 146 Wash. 2d 1, 11–12, 43 P.3d 4, 10 (2002).

81. See VOTERS’ PAMPHLET, *supra* note 72, at 52.

82. *Id.* at 53.

83. *Id.* at 52.

84. *Id.*

85. *Id.* at 53.

86. *Id.*

87. Sally G. Mahoney, *State Women’s Council Hears Proposals for 1973 Legislation*, THE

tallies were counted, the executive director of the Washington State Women's Council, Gisela Taber, offered a reason for a possible defeat of the amendment: "People think what they read in a voters' pamphlet is gospel, but in reality some of those statements were misleading, to say the least."⁸⁸ One supporter of the amendment noted, "Many men and women are afraid of its implications—they didn't understand it."⁸⁹ Still, the Pamphlet's statements remained unchanged and Washington voters approved the amendment only by a small margin: 50.1% to 49.9%.⁹⁰ Throughout the counting of the absentee ballots, the fate of the amendment seemed uncertain.⁹¹ Ultimately, King County voters provided the biggest push in favor of the amendment, and Thurston County provided the smallest majority, where the amendment won by only eleven votes.⁹²

II. THE FEDERAL EQUAL RIGHTS AMENDMENT: THE STANDARD OF REVIEW AND THE STATE ACTION REQUIREMENT

A. *The Standard of Review*

1. *The Standard of Review Used at the Federal Level*

The U.S. Supreme Court has held that, unlike race-based discrimination which is subject to strict scrutiny, sex-based discrimination claims are reviewed under the less rigorous *intermediate* standard of review.⁹³ Although activists have made repeated attempts to persuade the Court to apply a higher level of scrutiny to gender-based discrimination—and although lower courts have criticized the intermediate standard of review as being vague—the Supreme Court continues to apply intermediate scrutiny to classifications based on gender.⁹⁴ Yet the Court

SEATTLE DAILY TIMES, Nov. 17, 1972, at C1.

88. See Marcia Schultz & Janet Horne, *Rights Vote a 'Surprise'; Pros Hoping*, SEATTLE DAILY TIMES, Nov. 8, 1972, at G1 (quotations omitted).

89. See *id.* (quotations omitted).

90. See DON BRAZIER, *HISTORY OF THE WASHINGTON LEGISLATURE: 1965–1982*, at 20 (2007).

91. See Shelby Gilje, *Equal Rights Amendment Won by Less than 3,400 Votes*, SEATTLE DAILY TIMES, Nov. 29, 1972, at B5.

92. *Id.*

93. See *Craig v. Boren*, 429 U.S. 190, 218 (1976) (Rehnquist, J., dissenting) (holding that classifications based on sex are subject to intermediate scrutiny under the Equal Protection Clause of the Fourteenth Amendment rather than strict scrutiny.).

94. See Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L.J. 1201, 1211,

itself “has had some difficulty in agreeing upon the proper approach and analysis in cases involving challenges to gender-based classifications.”⁹⁵ Justice Rehnquist acknowledged that the Court lacked cohesiveness specifically regarding the appropriate standard of review, referencing the Court’s general application of intermediate scrutiny to gender-based classifications, but noting that the Court still “takes on a somewhat ‘sharper focus’ when gender-based classifications are challenged.”⁹⁶

However, the text of the proposed federal Equal Rights Amendment indicates that Congress intended for classifications based on sex to be prohibited absolutely.⁹⁷ Were the federal amendment to be formally adopted, some legal scholars have argued that this prohibition would require federal courts to apply an absolute standard of review—a standard even higher than strict scrutiny—or at the very least strict scrutiny itself.⁹⁸

2. *The Standard of Review Applied by the States*

This general confusion at the federal level regarding the standard of review to be applied to sex-based classifications has led to a lack of uniformity among the states.⁹⁹ The courts in states that have adopted their own versions of the federal Equal Rights Amendment apply differing standards of review.¹⁰⁰ Rather than consistently applying the muddled intermediate scrutiny standard employed by federal courts to sex-based discrimination claims, the majority of states with an equal rights amendment use a higher level of scrutiny.¹⁰¹

Two states—Pennsylvania and Washington—apply an absolute standard of review.¹⁰² This means that a sex-based classification “is invalid, unless it is based upon physical differences between the sexes.”¹⁰³ Other states utilize the strict scrutiny standard of review, which presumes that classifications based on sex are invalid unless the state is able to show

1213 (2005).

95. *Michael M. v. Superior Court of Sonoma Cty.*, 450 U.S. 464, 468 (1981).

96. *Id.* (citing *Craig v. Boren*, 429 U.S. 190, 210 n* (1976)).

97. *See Avner*, *supra* note 52, at 148.

98. *See, e.g., id.* (“The proposed federal amendment clearly reflects Congressional intent that sex be prohibited as a basis for classification in any law, regulation or governmental policy . . . [an] ‘absolute’ standard of review.”).

99. *Id.* at 147–48.

100. *See Paul B. Linton, State Equal Rights Amendments: Making a Difference or Making a Statement?*, 70 TEMP. L. REV. 907, 911–15 (1997).

101. *Id.* at 911.

102. *Id.*

103. *Id.*

that the classification advances a compelling state interest and that the classification is narrowly tailored to achieve that interest.¹⁰⁴ Some states with equal rights amendments employ the federal standard: intermediate scrutiny.¹⁰⁵ Rather than providing ammunition to critics of state equal rights amendments, the lack of consistency among the states in applying a standard of review indicates that these state amendments may be more powerful tools than those offered by federal law; in some instances, state equal rights amendments afford more protection against sex-based discrimination than other protections currently available at the federal level.¹⁰⁶

3. *The Standard of Review Applied by Washington Courts*

In Washington, the ERA “absolutely prohibits discrimination on the basis of sex.”¹⁰⁷ Washington courts have found that the amendment “mandates equality in the strongest of terms.”¹⁰⁸ By finding that the amendment requires the application of an absolute standard of review, Washington courts generally offer greater protections against discriminatory, sex-based classifications than other states that apply a less stringent standard of review to their own state equal rights amendments.¹⁰⁹ This absolute prohibition gives substantial strength to Washington’s ERA.

The legislative history of Washington’s ERA indicates that the Washington legislature intended that courts apply a standard of review even more rigorous than strict scrutiny; during the second reading session of the amendment on the floor of the state senate, Senator Albert Rasmussen declared, “[n]ow this proposed constitutional amendment is very clear, you cannot draw the line on account of sex for anything.”¹¹⁰ Senator Rasmussen’s remarks were indicative of the amendment’s absolute prohibition of discrimination on the basis of sex.¹¹¹ Since its enactment, Washington courts have interpreted the ERA as constituting an absolute prohibition of discrimination on the basis of sex—in accordance with legislative intent.¹¹²

104. *Id.* at 912.

105. *Id.* at 914.

106. *See* Avner, *supra* note 52, at 149.

107. Nat’l Elec. Contractors Ass’n v. Pierce Cty., 100 Wash. 2d 109, 127, 667 P.2d 1092, 1102 (1983).

108. *Id.*

109. *See* McCausland, *supra* note 5, at 468.

110. *See* S.J., 42d Leg., 2d Ex. Sess. 347 (Wash. 1972).

111. *Id.*

112. *See* Darrin v. Gould, 85 Wash. 2d 859, 871, 540 P.2d 882, 889 (1975) (finding that the

This absolute standard of review and the harsh test that it imposes on sex-based classifications, however, is limited by a few exceptions.¹¹³ The first exception to this absolute standard originated in Washington State Supreme Court's decision in *Seattle v. Buchanan*,¹¹⁴ which upheld a municipal ordinance banning the public exposure of female breasts.¹¹⁵ The dissent noted that where a classification "relates to a physical characteristic peculiar to one sex, and not common to both, the discrimination may be valid."¹¹⁶ The second exception to the absolute prohibition test permits classifications based on sex if those classifications are designed to promote equality of the sexes.¹¹⁷ This exception emerged in *Marchioro v. Chaney*.¹¹⁸ The court found that Washington's ERA was designed to eliminate discrimination, and therefore statutes enacted to promote equality were "precisely the purpose of this legislation."¹¹⁹

A possible third exception is that Washington courts may "approve sex-based classifications by finding that the classification does not result in different treatment for men and women."¹²⁰ The Washington State Supreme Court found in *Singer v. Hara*¹²¹ that the state's prohibition against gay marriage did not violate the amendment because the state treated both sexes equally: both male couples and female couples were denied marriage licenses.¹²² Similarly, the court in *Andersen v. King County*¹²³ found that Washington's Defense of Marriage Act did not violate the amendment because the law treated "both sexes the same; neither a man nor a woman may marry a person of the same sex."¹²⁴

legislature's intent in enacting Washington's ERA was "to do more than repeat what was already contained in the otherwise governing constitutional provisions, federal and state, by which discrimination based on sex was permissible under the rational relationship and strict scrutiny tests").

113. See McCausland, *supra* note 5, at 469.

114. 90 Wash. 2d 584, 584 P.2d 918 (1978).

115. *Id.* at 591, 584 P.2d at 921.

116. *Id.* at 616, 584 P.2d at 934 (Horowitz, J., dissenting).

117. See *Marchioro v. Chaney*, 90 Wash. 2d 298, 308, 582 P.2d 487, 493 (1978).

118. *Id.* In *Marchioro*, a Washington statute required that certain members of the state democratic committee be of the opposite sex. *Id.* at 300, 582 P.2d at 489. The Court held that the purpose of Washington's ERA was to assure women both actual and theoretical rights. *Id.* at 305–06, 582 P.2d at 491. Therefore, the statutory requirement that an equal number of both sexes be elected to the committee did not violate the ERA because neither sex was able to predominate. *Id.* at 306, 582 P.2d at 492.

119. *Id.* at 306, 582 P.2d at 491.

120. McCausland, *supra* note 5, at 470.

121. 11 Wash. App. 247, 522 P.2d 1187 (1974).

122. *Id.* at 254–56, 522 P.2d at 1192.

123. 158 Wash. 2d 1, 138 P.3d 963 (2006).

124. *Id.* at 10, 138 P.3d at 969. Although this interpretation of Washington's ERA has yet to be formally overturned, the Washington State Supreme Court's decision in both *Singer* and *Andersen*

These cases indicate that Washington's absolute standard of review of the ERA is a purposefully harsh test that may be, under certain, limited circumstances, flexible.¹²⁵ Despite the flexibility of this test, the absolute standard of review makes the ERA a powerful tool for litigants seeking to combat gender-based discrimination. When the Washington State Supreme Court first examined the state ERA in *Darrin v. Gould*¹²⁶ in 1975, the majority declared that its language made clear the need for the court to apply an absolute standard of review, rather than to "repeat what was already contained in the otherwise governing constitutional provisions."¹²⁷ Justice Horowitz, writing for the majority, stated that "[a]ny other view would mean the people intended to accomplish no change Had such a limited purpose been intended, there would have been no necessity to resort to the broad, sweeping, mandatory language of the Equal Rights Amendment."¹²⁸ The Washington State Supreme Court read the far-reaching, protective text of the ERA and found it to trigger a standard of review far more protective of individual rights than the current federal standard.¹²⁹ The court has not been similarly inclined to read the amendment's state action requirement in such broad terms.¹³⁰

B. *The State Action Requirement*

Despite the Washington State Supreme Court's robust and protective approach to the standard of review triggered by the ERA, the court has failed to be clear or consistent on the subject of the provision's state action requirement. The court's confusion is keeping with the "sheer frustration" commonly experienced when attempting an analysis of the state action requirement and its limits.¹³¹ At the federal level, the state action

may be disputed, the "opposite-sex requirement 'has always been the universal essential element of the marriage definition,'" and "[t]his sort of 'definitional' argument against marriage between same-sex couples was prominent in many early cases," and has since been discredited. *Wolf v. Walker*, 986 F. Supp. 2d 982 (W.D. Wis. 2014) (citing *Baker v. Nelson*, 291 N.W. 2d 310, 316 (Minn. 1971)). The court in *Wolf v. Walker* acknowledged the similarities between anti-miscegenation laws and the prohibition against same-sex marriage. See 986 F. Supp. 2d at 1004 (citing *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that Virginia's anti-miscegenation statutes, which rested "solely upon distinctions drawn according to race," were unconstitutional)).

125. See McCausland, *supra* note 5, at 470.

126. 85 Wash. 2d 859, 540 P.2d 882 (1975).

127. *Id.* at 871, 540 P.2d at 889.

128. *Id.*

129. See Linton, *supra* note 100, at 911.

130. See *infra* section III.C.

131. See *Developments in the Law: State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1250 (2010).

requirement has its origins in concerns of separation of powers and federalism.¹³² Now, he argues, “it is time to begin rethinking state action. It is time to again ask why infringements of the most basic values—speech, privacy, and equality—should be tolerated just because the violator is a private entity rather than the government.”¹³³ Moreover, at the state level, the concerns present at the federal level—separation of powers and federalism—are absent.¹³⁴ Thus, state courts have the freedom to be more flexible in their interpretation and definition of state action.¹³⁵

1. The State Action Requirement at the Federal Level

The text of the proposed federal Equal Rights Amendment explicitly included a state action requirement.¹³⁶ This state action requirement, along with the Supreme Court’s generally narrow understanding of it, clearly confines the breadth of protection offered to individuals bringing Constitutional claims of sex discrimination.¹³⁷ When states were in the process of ratifying the federal Equal Rights Amendment, women’s rights activists remained hopeful that the Equal Protection clause of the Fourteenth Amendment would offer protection to individuals bringing claims of sex-based discrimination against private actors.¹³⁸ Instead, the Equal Protection clause reads, “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”¹³⁹ The United States Supreme Court has interpreted the language of the Fourteenth Amendment to contain an explicit state action requirement, which prohibits discriminatory governmental action and does not reach purely private actors.¹⁴⁰ Similarly, the failed federal Equal Rights Amendment contained an explicit state action requirement, and this “obviously . . . limit[ed] the scope of protection afforded by the Federal Constitution against sex discrimination.”¹⁴¹

132. See Wharton, *supra* note 94, at 1227.

133. *Id.* at 505.

134. See Avner, *supra* note 52, at 150–51.

135. *Id.* at 151.

136. See H.R.J. Res. 208, 92d Cong. 2d Sess., 86 Stat. 1523 (1972) (“Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.”).

137. See Wharton, *supra* note 94, at 1208.

138. *Id.* at 1202.

139. U.S. CONST. amend. XIV, § 1.

140. See Wharton, *supra* note 94, at 1206.

141. *Id.* at 1208.

2. *The State Action Requirement at the State Level*

The Fourteenth Amendment's state action requirement derives, in part, out of "concerns of federalism, separation of powers and protection of individual autonomy."¹⁴² State constitutions, in contrast, need not worry about federalism or separation of powers in the same way that the federal constitution must.¹⁴³ Therefore, the state action requirements of the state equal rights amendments must be approached individually, on a case-by-case basis.¹⁴⁴ The various equal rights amendments adopted by the states differ substantially, particularly in regard to their state action requirements.¹⁴⁵ Montana's amendment clearly extends to discrimination by private actors.¹⁴⁶ Other states, including Colorado, Hawaii, Illinois, and Virginia, explicitly limit their own equal rights amendments to apply only to governmental actors.¹⁴⁷

Perhaps most analogous to Washington's ERA is Pennsylvania's parallel constitutional provision.¹⁴⁸ The plain text of Pennsylvania's equal rights amendment, which reads, "[e]quality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual," is ambiguous on the subject of state action.¹⁴⁹ Pennsylvania courts, grappling with this ambiguity, have held that "[t]he rationale underlying the 'state action' doctrine is irrelevant to the interpretation of the scope of the . . . [a]mendment, a state constitutional amendment adopted by the Commonwealth as part of its own organic law."¹⁵⁰ According to the Pennsylvania State Supreme Court, any

142. *Id.* at 1227.

143. *Id.* at 1228.

144. *Id.* at 1229.

145. *Id.*

146. *See* MONT. CONST. art. II, § 4 ("Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of . . . sex.").

147. *See* COLO. CONST. art. II, § 29 (prohibiting the denial of "[e]quality of rights under the law . . . by the state of Colorado."); HAW. CONST. art. I, § 3 (prohibiting denial of "equality of rights under the law . . . by the State on account of sex."); ILL. CONST. art. I, § 18 (prohibiting denial of equal protection of the law on account of sex "by the State or its units."); VA. CONST. art. I, § 11 (prohibiting "governmental discrimination" on the basis of sex).

148. Both Pennsylvania and Washington's equal rights amendments have been similarly interpreted by their respective state courts. *See, e.g.,* Inessa Baram-Blackwell, Comment, *Separating Dick and Jane: Single-Sex Public Education Under the Washington State Equal Rights Amendment*, 81 WASH. L. REV. 337, 353 (2006) (noting that differentiation on the basis of sex alone is unconstitutional under both [states' ERAs].).

149. PA. CONST. art. I, § 28.

150. *Hartford Accident & Indem. Co. v. Ins. Comm'r of the Commonwealth*, 482 A.2d 542, 549 (Pa. 1984); *see supra* Part IV.

“attempt to employ the state action concept of our federal system . . . [is] misplaced.”¹⁵¹ In arriving at its decision, the court used the explicit language of the amendment itself.¹⁵² The text of Pennsylvania’s equal rights amendment is appreciably similar to the language of Washington’s equal rights amendment; both use the phrase “under the law,” but make no explicit reference to a state action requirement.¹⁵³

III. INCONSISTENCIES IN WASHINGTON’S STATE CONSTITUTIONAL RIGHTS JURISPRUDENCE

In order to make sense of the Washington State Supreme Court’s state action jurisprudence in regard to the state Equal Rights Amendment, it is first necessary to scrutinize the Court’s understanding of the state action requirement in relation to other state constitutional provisions.¹⁵⁴ The Washington State Supreme Court’s analyses of the state constitution’s privacy, due process, and free speech provisions reveal a lack of consistency and an overreliance on the U.S. Constitution.

A. *Washington’s Privacy and Due Process Provisions*

The Washington constitution’s privacy provision states, “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.”¹⁵⁵ The language of Washington’s privacy provision¹⁵⁶ differs considerably from its parallel federal provision: the Fourth Amendment to the U.S. Constitution.¹⁵⁷ The Washington State Supreme Court determined in *State v. Simpson*¹⁵⁸ that “[h]istorical evidence reveals that the framers of the Washington [c]onstitution intended to establish a search and seizure provision that varied from the federal provision.”¹⁵⁹ In fact, Washington’s constitutional convention unequivocally rejected the

151. *Hartford*, 482 A.2d at 549.

152. *Id.*

153. *See* WASH. CONST. art. XXXI, § 1 (“Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.”).

154. For an analysis of whether a Washington constitutional provision offers greater protections than an analogous U.S. Constitutional provision, *see infra* note 227.

155. WASH. CONST. art. I, § 7.

156. *Id.*

157. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

158. 95 Wash. 2d 170, 622 P.2d 1199 (1980).

159. *State v. Simpson*, 95 Wash. 2d 170, 178, 622 P.2d 1199 (1980).

exact wording of the Fourth Amendment in favor of the current language of Washington's privacy provision.¹⁶⁰ Despite the framer's inclusion of intentionally dissimilar language in Washington's privacy provision, the Washington State Supreme Court has held that "[a]s a general proposition, neither state nor federal constitutional protections against unreasonable search and seizure are implicated in the absence of state action."¹⁶¹ This demonstrates an overreliance on the U.S. Constitution in the court's interpretations of a state constitutional provisions.

Washington's due process clause, which similarly lacks an explicit state action requirement reads, "[n]o person shall be deprived of life, liberty, or property, without due process of law."¹⁶² In the 1975 case *Borg-Warner Acceptance Corp. v. Scott*,¹⁶³ the Washington State Supreme Court held that only action by the state is "subject to the due process requirements of the state and federal constitutions."¹⁶⁴ But in reaching this conclusion, the Court relied on *Faircloth v. Old National Bank*,¹⁶⁵ a case that focused purely on the state action requirement of the Fourteenth Amendment to the U.S. Constitution.¹⁶⁶ The court in *Borg-Warner* interpreted Washington's due process provision as requiring the same state action as the Fourteenth Amendment to the U.S. Constitution.¹⁶⁷ Yet Washington courts have determined that "where our constitutional provision is linguistically different from its parallel in the federal constitution, we are not bound to treat the state and federal constitutions as coextensive."¹⁶⁸ Therefore, the *Borg-Warner* Court had the power to interpret Washington's due process clause—which differs considerably from the federal Due Process Clause¹⁶⁹—as lacking an explicit state action requirement.¹⁷⁰

160. *Id.*

161. *In re Personal Restraint of Maxfield*, 133 Wash. 2d 332, 337, 945 P.2d 196, 198 (1997) (citing *State v. Ludvick*, 40 Wash. App. 257, 698 P.2d 1064 (1985)).

162. WASH. CONST. art. I, § 3.

163. 86 Wash. 2d 276, 543 P.2d 638 (1975).

164. *Id.* at 276, 278, 543 P.2d at 640.

165. 86 Wash. 2d 1, 541 P.2d 362 (1975).

166. *See Faircloth v. Old Nat'l Bank*, 86 Wash. 2d 1, 6, 541 P.2d 362, 365 (1975) (finding that the enactment of a statute authorizing repossession of an automobile "is not in and of itself sufficient state action to compel invocation of the Fourteenth Amendment due process clause.").

167. *See Borg-Warner*, 86 Wash. 2d at 278, 543 P.2d at 640 (1975).

168. *See Alderwood Assocs. v. Wash. Envtl. Council*, 96 Wash. 2d 230, 243, 635 P.2d 108, 116 (1981).

169. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.").

170. *See supra* section II.B.2.

B. Washington's Free Speech Provision

In the 1981 case *Alderwood Associates v. Washington Environmental Council*,¹⁷¹ the Washington State Supreme Court debated the existence of a state action requirement in two provisions of the state constitution: the free speech provision and the initiative guarantee.¹⁷² The four-member plurality contrasted the First Amendment to the U.S. Constitution, which explicitly contains a state action requirement,¹⁷³ and Washington's own free speech provision.¹⁷⁴ The plurality in *Alderwood* explained that that case was the Washington State Supreme Court's first opportunity to determine whether these provisions "require[d] the same 'state action' as the Fourteenth Amendment."¹⁷⁵ In its analysis, the plurality looked to analogous provisions in both California and New Jersey's constitutions, which similarly lacked an explicit state action requirement.¹⁷⁶ In both states, courts had concluded that their constitutional provisions did not require state action as defined by the federal government.¹⁷⁷

Although analyzing state action under the Fourteenth Amendment is a balancing of interests, the plurality in *Alderwood* reasoned that there are "two factors not restraining state courts when applying state law."¹⁷⁸ The first factor is that the U.S. Supreme Court's interpretation of the Fourteenth Amendment impacts the entire country.¹⁷⁹ Thus the Supreme Court must take into account the disparities between the states and create a rule that accounts for these variations.¹⁸⁰ The second factor is that the U.S. Supreme Court "must take a conservative theoretical approach to applying the Fourteenth Amendment . . . [because] [f]ederalism prevents the [C]ourt from adopting a rule which prevents states from experimenting."¹⁸¹

The plurality in *Alderwood* ultimately reasoned that it was not

171. 96 Wash. 2d 230, 635 P.2d 108 (1981).

172. *See id.* at 230, 234, 635 P.2d at 111.

173. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances").

174. *Alderwood*, 96 Wash. 2d at 240, 635 P.2d at 114.

175. *Id.*

176. *Id.* at 240–41, 635 P.2d at 114–15.

177. *Id.*

178. *Id.* at 242, 635 P.2d at 115.

179. *Id.*

180. *Id.*

181. *Id.*

constrained by the factors limiting the United States Supreme Court, and therefore determined that state action was not required¹⁸² in order to invoke the free speech provision of the Washington Constitution.¹⁸³ The plurality in *Alderwood*¹⁸⁴ also stated that Washington's initiative guarantee¹⁸⁵ lacked a state action requirement.¹⁸⁶ The plurality conceded that its reading of these state constitutional provisions was not without limit, and that "[d]etermining when the Washington speech and initiative guaranties will apply to private conduct must evolve with each decision, for an all inclusive definition is not practicable."¹⁸⁷ The plurality instead employed a balancing test analyzing the nature of the speech activity, the regulation of that speech, and the use and nature of the private property.¹⁸⁸ Because "[t]he law is not a static concept and it expands to meet the changing conditions of modern life," the Court decided to evolve its state action jurisprudence.¹⁸⁹

The 1989 case *Southcenter Joint Venture v. National Democratic Policy Committee*¹⁹⁰ disturbed the plurality opinion in *Alderwood*.¹⁹¹ In *Southcenter*, the Washington State Supreme Court reasoned that Washington's free speech provision made did not explicitly reference state action, but that:

It is a 2-foot leap across a 10-foot ditch, however, to seize upon the absence of a reference to the State as the actor limited by the state free speech provision and conclude therefrom that the framers of our state constitution intended to create a bold new right that conflicts with the fundamental premise on which the entire constitution is based.¹⁹²

The court concluded that the "likely and reasonable explanation" for the lack of the explicit state action requirement in the text was that the legislators "viewed them as redundant and in the interest of simplicity

182. *See id.* at 243.

183. WASH. CONST. art. I, § 5 ("Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.").

184. *Alderwood*, 96 Wash. 2d at 243, 635 P.2d at 115.

185. WASH. CONST. art. II, § 1(a) ("The first power reserved by the people is the initiative.").

186. *See Alderwood*, 96 Wash. 2d at 243, 635 P.2d at 115.

187. *Id.* at 244, 635 P.2d at 116.

188. *Id.*

189. *See id.* at 239, 635 P.2d at 113.

190. 113 Wash. 2d 413, 780 P.2d 1282 (1989).

191. 96 Wash. 2d 230, 635 P.2d 108 (1981).

192. *Southcenter Joint Venture v. Nat'l Democratic Policy Comm'n*, 113 Wash. 2d 413, 424, 780 P.2d 1282, 1287-88 (1989).

simply deleted them.”¹⁹³ The majority held that “although an express reference to ‘state action’ is absent from the free speech provision of our state constitution, a ‘state action’ limitation is implicit therein.”¹⁹⁴ The court reasoned that “compelling policy reasons” supported a finding of a state action requirement.¹⁹⁵ But in reaching this conclusion, the majority relied on the *federal* policy justifications behind the state action requirement.

The concurrence by Justice Utter in *Southcenter* lambasted the majority’s implication of a state action requirement, finding “[t]he state action doctrine is generally inappropriate at the state level . . . Analysis of this case following the nonexclusive criteria developed in *State v. Gunwall* . . . shows that the state action doctrine is incongruent with much of the state constitution in general.”¹⁹⁶ Justice Utter contended that the “plain language and drafting history” of the state’s free speech provision actually suggested that there was no state action requirement, and that the majority had effectively ignored the language of the provision itself.¹⁹⁷ “[T]he adoption and subsequent deletion of the express state action requirement in the Washington committee’s first draft strongly suggest an awareness and rejection of such a requirement.”¹⁹⁸

C. *Washington’s Equal Rights Amendment*

Although the text of Washington’s ERA lacks an express state action requirement, the Washington State Supreme Court has found one to be implied. Only three years after the adoption of the ERA into the Washington State Constitution, the Washington State Supreme Court held, “[i]t is agreed by the parties that in order to maintain an action under the Equal Rights Amendment, Const. art. 31, § 1 (amendment 61), where the alleged discrimination has been effected by a private agency, it is necessary to show that some ‘state action’ is involved.”¹⁹⁹ Again, the Washington State Supreme Court focused on the presence of state action, rather than asking whether the ERA did indeed have a state action

193. *Id.* at 424, 780 P.2d at 1288.

194. *Id.*

195. *Id.* at 430, 780 P.2d at 1290.

196. *Id.* at 435–36, 780 P.2d at 1293 (Utter, J., concurring).

197. *Id.* at 435, 780 P.2d at 1293 (Utter, J., concurring).

198. Robert F. Utter, *The Right to Speak, Write, and Publish Freely: State Constitutional Protection Against Private Abridgement*, 8 U. PUGET SOUND L. REV. 157, 177 (1985).

199. See *MacLean v. First Northwest Indus. of America, Inc.*, 96 Wash. 2d 338, 347, 635 P.2d 683, 688 (1981).

requirement.²⁰⁰ In reaching this conclusion, the Court built on *Darrin v. Gould*, which had also failed to extend its analysis to ask whether the ERA contained a state action requirement.²⁰¹

Even in hearing claims that are not brought directly under Washington's ERA, the Washington State Supreme Court has been inconsistent in its analysis of the state action doctrine. Justice Alexander's concurrence in *Roberts v. Dudley*²⁰² argued that a "powerful source of public policy against sex discrimination can be found in this state's Equal Rights Amendment."²⁰³ He continued,

Respondents and amici have argued that we should not consider the ERA as a relevant source of public policy, contending that it serves only to prevent sex discrimination by the State. Although I would observe that there is no case from this court that supports that argument, we need not resolve the issue because we are not called upon to enforce a right under our state's constitution . . . I can think of no more appropriate place to glean a state's fundamental policies than its state constitution . . . I am in accord with the view expressed by the California Supreme Court when it ruled that sex discrimination in employment might support claim of tortious discharge in contravention of public policy.²⁰⁴

Justice Alexander cited *Rojo v. Kliger*,²⁰⁵ in which the Supreme Court of California found that the question of whether a state constitutional provision applied to state action was irrelevant, as the provision reflected a public policy against gender-based discrimination in employment.²⁰⁶ Justice Alexander's concurrence similarly illustrates that Washington's ERA can serve as an underlying basis for understanding and applying the law.²⁰⁷

200. *Id.* at 348, 635 P.2d at 688.

201. *Id.* at 347, 635 P.2d at 688.

202. 140 Wash. 2d 58, 77, 993 P.2d 901, 911 (2000) (concluding that plaintiff had "properly stated a cause of action for the tort of wrongful discharge based on the clearly articulated public policy against sex discrimination in employment" based on Title 49 of the Washington Revised Code, which governs labor relations).

203. *Roberts v. Dudley*, 140 Wash. 2d 58, 77, 993 P.2d 901, 911 (2000) (Alexander, J., concurring).

204. *Id.* at 78, 993 P.2d at 911–12 (Alexander, J., concurring).

205. 801 P.2d 373 (Cal. 1990).

206. *See Rojo*, 801 P.2d at 389 (finding that "whether article I, section 8 [of the California constitution's employment discrimination provision] applies exclusively to state action is largely irrelevant; the provision unquestionably reflects a fundamental *public policy* against discrimination in employment—public or private—on account of sex").

207. *See infra* section IV.B.

In *Griffin v. Eller*,²⁰⁸ a dissent by Justice Talmadge effectively argued that Washington's ERA should be applied to private action.²⁰⁹ Justice Talmadge reminded the majority, which had concluded that employers of fewer than eight employees were exempt from the statute providing a remedy for sex-based discrimination claims, that Washington's ERA provides protections "beyond those of the federal Equal Protection Clause," and that "[e]quality on the basis of sex is not upheld if the [statute] provides no remedy whatsoever for sex discrimination for women employed in small businesses, the majority of all businesses in the state."²¹⁰

Justice Talmadge argued in his dissent that the majority had created two classes of employees: individuals employed by larger employers, who are statutorily protected and "may vindicate their civil right to be free of discrimination," and individuals who are employed by smaller businesses, who are provided no such statutory protection.²¹¹ Justice Talmadge concluded that the statute,²¹² even if properly interpreted by the majority, was unconstitutional under Washington's ERA because the statute does not protect individuals who experience sex-based discrimination by businesses who employ fewer than eight employees.²¹³ This indicates that there are statutory gaps in protection of rights that should be filled by the ERA.

IV. THE EQUAL RIGHTS AMENDMENT AND THE PRIMACY OF THE WASHINGTON STATE CONSTITUTION

The existence of state equal rights amendments "indicate[s] a specific desire to provide more comprehensive protection against sex discrimination than that available under the existing Federal Constitution."²¹⁴ In the current age of "new judicial federalism," state

208. 130 Wash. 2d 58, 922 P.2d 788 (1996).

209. *See id.* at 58, 95, 922 P.2d at 806.

210. *Id.* at 95, 922 P.2d at 805–06.

211. *Id.* at 94, 922 P.2d at 805.

212. *Id.* The statute at issue in *Griffin* in 1996 currently reads, "[t]his chapter shall be known as the 'law against discrimination.' It is an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights." WASH. REV. CODE § 49.60.010 (2019). The statute still defines "employer" as "any person acting in the interest of an employer, directly or in directly, who employs eight or more persons and does not include any religious or sectarian organization not organized for private profit." *Id.* § 49.60.040 (1995).

213. *Griffin*, 130 Wash. 2d at 94, 922 P.2d at 805 (Talmadge, J., dissenting).

214. Wharton, *supra* note 94, at 1201–02.

provisions are becoming increasingly significant to individuals seeking more protection than the federal Constitution offers.²¹⁵ New judicial federalism is, according to Justice Brennan, the “[r]ediscovery by state supreme courts of the broader protections afforded their own citizens by their statute constitutions . . . [which] is probably the most important development in constitutional jurisprudence in our times.”²¹⁶

The term new judicial federalism is not, in fact, new. Indeed, many scholars have maintained that the concept is instead a “rediscovery.”²¹⁷ State constitutions were, prior to the 1930s, “the primary vehicle for protecting individual rights.”²¹⁸ Later, from the 1930s until the 1970’s, the federal government assumed the role of protector.²¹⁹ This interpretation came to an end in 1969 with the appointment of Chief Justice Warren Burger by President Richard Nixon, leading to a conservative shift on the U.S. Supreme Court.²²⁰ As the Court turned away from judicial activism, litigants began to look elsewhere for protection.²²¹ Just as Justice Brennan feared, the “increasingly conservative federal judiciary” began to decline to protect individual liberties as robustly as it had in the past.²²² Civil liberties litigants instead searched for protection in state courts, and thus the past few decades have seen “an upsurge in state courts’ reliance on state declarations of rights in civil liberties cases.”²²³

The Washington State Supreme Court’s reliance on the federal constitution in its own state constitutional interpretation can be “improper and premature.”²²⁴ It is a well-established principle that state courts may interpret their own state constitutions as being more protective of individual rights than their counterparts in the U.S. Constitution.²²⁵ Particularly in instances where the language of provisions in the Washington constitution differs from the language of parallel provisions

215. See ROBERT F. WILLIAMS, *The New Judicial Federalism*, in *THE LAW OF AMERICAN STATE CONSTITUTIONS* 127 (Oxford Univ. Press 2009).

216. *Id.* at 113.

217. See G. Alan Tarr, *The Past and Future of the New Judicial Federalism*, 24 *PUBLIUS: J. FEDERALISM* 63, 64 (1994).

218. *Id.*

219. *Id.* at 65.

220. See WILLIAMS, *supra* note 218, at 115.

221. *Id.*

222. See John Kincaid, *Foreword: The New Federalism Context of the New Judicial Federalism*, 26 *RUTGERS L.J.* 913, 914–15 (1995) (quoting Suzanna Sherry, *Foreword: State Constitutional Law: Doing the Right Thing*, 25 *RUTGERS L.J.* 935 (1994)).

223. See Tarr, *supra* note 220, at 73–74.

224. *State v. Coe*, 101 Wash. 2d 364, 374, 679 P.2d 353, 359 (1984).

225. See *Oregon v. Hass*, 420 U.S. 714 (1975).

in the U.S. Constitution, Washington courts are “not bound to assume the framers intended an identical interpretation.”²²⁶ In the context of Washington’s privacy, due process, and free speech provisions, it may be necessary to analyze the Washington State Supreme Court’s overreliance on the federal constitution.²²⁷ However, in the context of Washington’s ERA, the same analysis is unwarranted because there is no analogous federal provision: the federal Equal Rights Amendment was never ratified.

A. *The Significance of Washington’s Equal Rights Amendment*

Why do Washington litigants generally turn to statutory protections against gender-based discrimination, rather than relying on the strength of the state ERA?²²⁸ Perhaps the answer lies in its point of weakness: its implicit state action requirement. The Washington State Supreme Court can clarify its interpretation of Washington’s ERA. Without a state action requirement, the ERA would become available as a source of rights to a much broader range of individuals. And, should Washington courts be reticent to eliminate entirely the implicit state action requirement of the ERA, a more circumscribed reading of the state action requirement would still be beneficial to individuals facing gender-based discrimination, particularly to those who endure discrimination at the hands of private individuals.²²⁹

Some gender equality advocates have argued that a state action

226. *State v. Fain*, 94 Wash. 2d 387, 393, 617 P.2d 720, 723 (1980) (finding that the framers of the Washington Constitution believed that the word “cruel” sufficiently indicated their intent and thus refused to insert the word “unusual” into WASH. art. I, § 14).

227. In the 1981 Washington State Supreme Court case, *Alderwood Associates v. Washington Environmental Council*, Justice Utter reasoned that state constitutions may be evaluated independently of the federal Constitution, particularly when federal protections of individual rights have not “changed with the evolution of our society.” 96 Wash. 2d 230, 238, 635 P.2d 108, 113 (1981). Decisions such as *Alderwood* worried critics, who felt that Washington courts were “picking and choosing between state and federal constitutions.” *State v. Ringer*, 100 Wash. 2d 686, 703, 674 P.2d 1240, 1250 (1983) (Dimmick, J., dissenting). These critics worried that this “reliance on state charters was result-oriented.” ROBERT F. UTTER & HUGH D. SPITZER, *THE WASHINGTON STATE CONSTITUTION* 12 (2d ed. 2013). The Washington State Supreme Court then decided *State v. Gunwall*, 106 Wash. 2d 54, 61, 720 P.2d 808, 812 (1986), in 1986. The majority in *Gunwall* provided “six nonexclusive neutral criteria synthesized from a burgeoning body of authority, relevant to determining whether, in a given situation, the constitution of the State of Washington should be considered as extending broader rights to its citizens than does the United States Constitution.” *Id.* at 61, 720 P.2d at 812. As Washington’s ERA lacks an analogous federal provision, a *Gunwall* analysis is unnecessary here.

228. A search on LexisNexis produced only forty-five cases in Washington that cite to the state’s Equal Rights Amendment. A search on LexisNexis for cases that cite Washington’s Laws Against Discrimination, WASH. REV. CODE § 49.60 (2019), along with the terms “gender” or “sex” produced almost four hundred results.

229. Wharton, *supra* note 94, at 1208.

requirement impacts women more significantly than men²³⁰.

The major sites of women's oppression—including the nongovernmental workplace and home—are located in the private sphere of civil society and therefore have historically not been considered appropriate subjects for protection under federal constitutional and civil rights law. Gender inequality arising from disparities in private power is invisible to a system designed to protect individuals from state interference.²³¹

However, the states, rather than the federal government “with its narrower delegated powers,” are charged with regulating the private actions of individuals.²³² And “[t]he argument for applying constitutional norms specifically to private discrimination against women might note that women's physical and occupational confinement in the private sphere might well make state omissions of enforcement against discriminatory harms particularly hard to prove, necessitating remedies that directly reach sex-discriminatory private actors.”²³³

Discrimination and violence based on gender is typically “committed by private actors, but it is facilitated by state action and inaction.”²³⁴ Such state *inaction* may be, according to Justice Talmadge in his dissent in *Griffin v. Eller*,²³⁵ a form of state *action*—a so-called *reverse state action*. Gaps in statutory protection may leave room for discrimination. Furthermore, although a number of federal statutes provide protection against sex-based discrimination by private actors, these statutes are narrow and targeted.²³⁶ These protections may be susceptible to repeal, and federal agencies may enforce them only in limited circumstances.²³⁷ Thus, Washington's ERA should be more broadly interpreted as lacking a state action requirement.

B. The Dormant Power of Washington's Equal Rights Amendment: Its Standard of Review and (Lack of a) State Action Requirement

Washington's ERA already has one powerful tool at its disposal: its

230. *Id.*

231. Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 38 (2000).

232. See Kathleen M. Sullivan, *Constitutionalizing Women's Equality*, 90 CALIF. L. REV. 735, 755 (2002).

233. *Id.* at 757–58.

234. See Goldfarb, *supra* note 234, at 12.

235. 130 Wash. 2d 58, 95–96, 922 P.2d 788, 805–06 (1996) (Talmadge, J., dissenting); see *supra* section III.C.

236. See Wharton, *supra* note 94, at 1208.

237. *Id.* at 1209.

triggering of an absolute standard of review.²³⁸ Washington courts have read the plain language of the state ERA as providing an absolute prohibition against discrimination on the basis of sex.²³⁹ Although there are some limited exceptions,²⁴⁰ the absolute standard of review applied by Washington courts to the state ERA is a point of strength. This standard of review is far more protective than the current federal standard—which currently applies a somewhat confused intermediate standard of review²⁴¹—and is also more protective than the current standard applied by most states.²⁴² The Washington State Supreme Court has made the broad, protective determination that the state’s ERA triggers an absolute prohibition on gender-based discrimination.²⁴³ The court should make the same leap with respect to the amendment’s state action requirement.

Washington courts are not required to find a state action requirement implicit within the text of its constitutional provisions. Judith Avner, a legal advocate of gender equality, explains,

The narrow construction of the state action requirement by federal courts is intended to protect states’ traditional jurisdiction over private actions. States themselves, however, are not under similar constraints in interpreting state action doctrine under their own constitutions, and are empowered to conclude that less state involvement is required under state ERAs than the fourteenth amendment.²⁴⁴

The court’s interpretation of a state action requirement in Washington’s ERA is not mandated by any explicit state action requirement contained in the failed federal Equal Rights Amendment. Indeed, Washington courts may interpret the state constitution as being more protective of individual rights than the parallel provision in the U.S. Constitution. Moreover, the federal Equal Rights Amendment is currently stalled, its future is uncertain. This suggests that the states which have adopted their own equal rights amendments may play a more substantial role in protecting against sex-based discrimination. Thus, Washington courts need not waste their time analyzing Washington’s ERA through the lens of a failed federal amendment. The Washington Legislature was provided a blank slate with which to work, and the language of the state amendment was chosen

238. *See* Darrin v. Gould, 85 Wash. 2d 859, 870, 540 P.2d 882 (1975).

239. *See* Sw. Wash. Chapter, Nat’l Elec. Contractors Ass’n v. Pierce Cty., 100 Wash. 2d 109, 127, 667 P.2d 1092 (1983).

240. *See* McCausland, *supra* note 5, at 469.

241. *Michael M. v. Superior Court of Sonoma Cty.*, 450 U.S. 464, 468 (1981).

242. *See* McCausland, *supra* note 5, at 469.

243. Darrin, 85 Wash. 2d at 870, 540 P.2d at 889.

244. Avner, *supra* note 52, at 150.

specifically to differ from the failed federal amendment.

Other states' equal rights amendments also differ considerably from the failed federal amendment with regard to the state action requirement.²⁴⁵ Some states expressly require state action in the plain text of their amendments, while others are ambiguous.²⁴⁶ Washington's ERA falls into the ambiguous category. The plain text of the amendment does not contain a state action requirement; the ERA reads only that, "under the law," equality of rights shall not be abridged on the basis of sex.²⁴⁷ Though ambiguous in its wording, Washington courts insist on finding a state action requirement.²⁴⁸ Pennsylvania's equal rights amendment is similarly ambiguous on the subject of state action.²⁴⁹ Just as Washington's ERA reads "under the law," Pennsylvania's provision includes the same phrase.²⁵⁰ Rather than imply a state action requirement, however, Pennsylvania courts have unequivocally decided that its amendment lacks such a requirement.²⁵¹ The Washington State Supreme Court should reach the same conclusion. Employing the state action requirement at the state level is unnecessary because the plain text of Washington's ERA is ambiguous as to its state action requirement.

State action jurisprudence in Washington, with respect to state constitutional provisions, is generally inconsistent and overly reliant on the U.S. Constitution.²⁵² In interpreting Washington's privacy and due process provisions, the Court has relied on parallel federal provisions rather than conducting its own independent examination of the state constitution.²⁵³ Furthermore, the Court has concluded that the language of Washington's free speech provision, which lacks an explicit state action requirement, was merely due to arbitrary and haphazard drafting by the legislators.²⁵⁴ The plain text of the provision itself indicates the purposeful absence of a state action requirement, and the state action doctrine is neither

245. Wharton, *supra* note 94, at 1229.

246. *Id.*

247. WASH. CONST. art. XXXI, § 1.

248. *See, e.g.,* MacLean v. First Nw. Indus. Of America, 96 Wash. 2d 338, 347, 635 P.2d 683, 688 (1981) (determining that the involvement of some state action is required to bring an action under Washington's ERA).

249. PA. CONST. art. I, § 28.

250. PA. CONST. art. I, § 28; WASH. CONST. art. XXXI, § 1.

251. Hartford Accident & Indem. Co. v. Ins. Comm'r of the Commonwealth, 482 A.2d 542, 549 (Pa. 1984).

252. *See supra* section III.A.

253. *Id.*

254. *See* Southcenter Joint Venture v. Nat'l Democratic Policy Comm'n, 113 Wash. 2d 413, 424, 780 P.2d 1282, 1288 (1989).

necessary nor appropriate at the state level.²⁵⁵

Washington's ERA similarly lacks an explicit state action requirement, yet the Washington State Supreme Court has interpreted one to be implicit.²⁵⁶ In hearing claims based on the ERA, the Washington State Supreme Court has consistently focused on the presence of state action—rather than the presence of a state action *requirement*.²⁵⁷ The Court has repeatedly made an assumption about the existence of a state action requirement without analyzing the basis of that assumption. This has led to gaps in statutory protections for individuals facing gender-based discrimination and it is a betrayal of public policy and legislative intent. In order to more adequately provide protections against gender-based discrimination, Washington's ERA should be interpreted as lacking a state action requirement.

The ERA, absent a state action requirement, would not necessarily be a tool to reach all private actors. Rather, it would be a tool that Washington courts could use to reach the discriminatory conduct of private individuals engaging in the marketplace. The Washington State Supreme Court has clearly expressed that there is no natural right to be in business.²⁵⁸ Moreover, commercial enterprises held open to the public or businesses entered into voluntarily are not excused from complying with anti-discrimination laws.²⁵⁹

The ERA, were it to be interpreted as lacking a state action requirement, would only reach the conduct of private individuals

255. *Id.* at 436, 780 P.2d at 1293 (Utter, J., concurring).

256. *See supra* section III.C.

257. *Id.*

258. *See State ex rel. Stiner v. Yelle*, 174 Wash. 402, 406, 25 P.2d 91, 93 (1933) (upholding a business tax and finding that “the [Washington] constitution defines property as anything subject to ownership and, in a sense, one’s business and its earnings are owned by him, but the privilege of engaging in business and gainful pursuits under the protection of ours laws is something which must and does exist before the business can be established, and something far and away beyond and above the mere ownership of a business”).

259. *See, e.g., United States v. Lee*, 455 U.S. 252, 261 (1982) (holding that “every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.”); *see also Backlund v. Bd. Of Comm’rs of King Cty. Hosp. Dist. No. 2*, 106 Wash. 2d 632, 648, 724 P.2d 981, 990 (1986) (determining that “[t]hose who enter into a profession as a matter of choice, necessarily face regulation as to their own conduct”); *State v. Arlene’s Flowers, Inc.*, 187 Wash. 2d 804, 851, 389 P.3d 543, 566 (2017) (finding that “[a]s every other court to address the question has concluded, public accommodations laws do not simply guarantee access to goods or services. Instead, they serve a broader societal purpose: eradicating barriers to the equal treatment of all citizens in the commercial marketplace.”).

engaging in a commercial business—an area that is already subject to a great deal of regulation.²⁶⁰ The ERA is, effectively, a constitutional exercise of the police power of the state. Police power is typically exercised through statutes,²⁶¹ but even statutes have limitations. Statutes such as the Washington laws against discrimination do not protect against discrimination that occurs in truly private capacities. Similarly, Washington's ERA would not reach the truly private conduct of individuals. It would, however, fulfill its policy objective of prohibiting gender-based discrimination by filling in certain gaps left by the Washington laws against discrimination.²⁶² This would fall in line with Justice Talmadge's dissent in *Griffin v. Eller*²⁶³: Washington's ERA could still become an element of a court's rationale, even in a purely private lawsuit that involves marketplace conduct.

If the Washington State Supreme Court is reticent to interpret the ERA as lacking a state action requirement or as reaching private conduct, the court alternatively could view the ERA from a foundational, policy perspective. Justice Alexander's concurrence in *Roberts v. Dudley*²⁶⁴ illustrates the potential value of this reading of the Amendment. The Amendment would serve as a reminder of the public policy aims of the legislature, and Washington courts could use it to more broadly understand and interpret the law.

CONCLUSION

The federal Equal Rights Amendment is currently in a comatose state—not yet enacted, but not yet entirely abandoned. In its stead, state constitutional provisions are becoming increasingly important in protecting individual rights. Washington's ERA could be a powerful tool for litigants seeking protection from gender-based discrimination. Its utility would only increase were the Washington State Supreme Court to interpret it as lacking a state action requirement. The inconsistencies in the court's state action jurisprudence has restricted the usefulness of constitutional provisions such as the ERA; Washington courts should

260. See, e.g., WASH. REV. CODE § 49 (chapters governing labor regulations).

261. See, e.g., WASH. REV. CODE § 49.60.010 (2019) (stating that the statute “is an exercise of the police power of the state”).

262. See, e.g., WASH. REV. CODE § 49.60.040(11) (stating that the Washington laws against discrimination only apply to businesses with more than eight employees); see also *Griffin v. Eller*, 130 Wash. 2d 58, 922 P.2d 788 (1996).

263. 130 Wash. 2d 58, 72, 922 P.2d 788, 794 (Talmadge, J., dissenting).

264. *Roberts v. Dudley*, 140 Wash. 2d 58, 77, 993 P.2d 901, 911 (Alexander, J., concurring).

resolve these inconsistencies and more broadly interpret the ERA as lacking a state action requirement. Asked whether he foresaw “‘any great battle mounting’ over women’s rights legislation,” particularly the ERA, Washington state Senator Robert C. Bailey said he did not, “unless it would be with ‘lawyers who hate to change the mode of law that they have studied and learned over the years.’”²⁶⁵

265. Sally Gene Mahoney, *Women’s-Rights Legislation Faces Uneven Road*, SEATTLE DAILY TIMES, Jan. 9, 1972, at G7.